

89-326

Supreme Court, U.S.

FILED

AUG 24 1989

JOSEPH F. SPANIOLO, JR.
CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DORMAN O. YOUNG, d/b/a TIFFANY'S,
Petitioner

v.

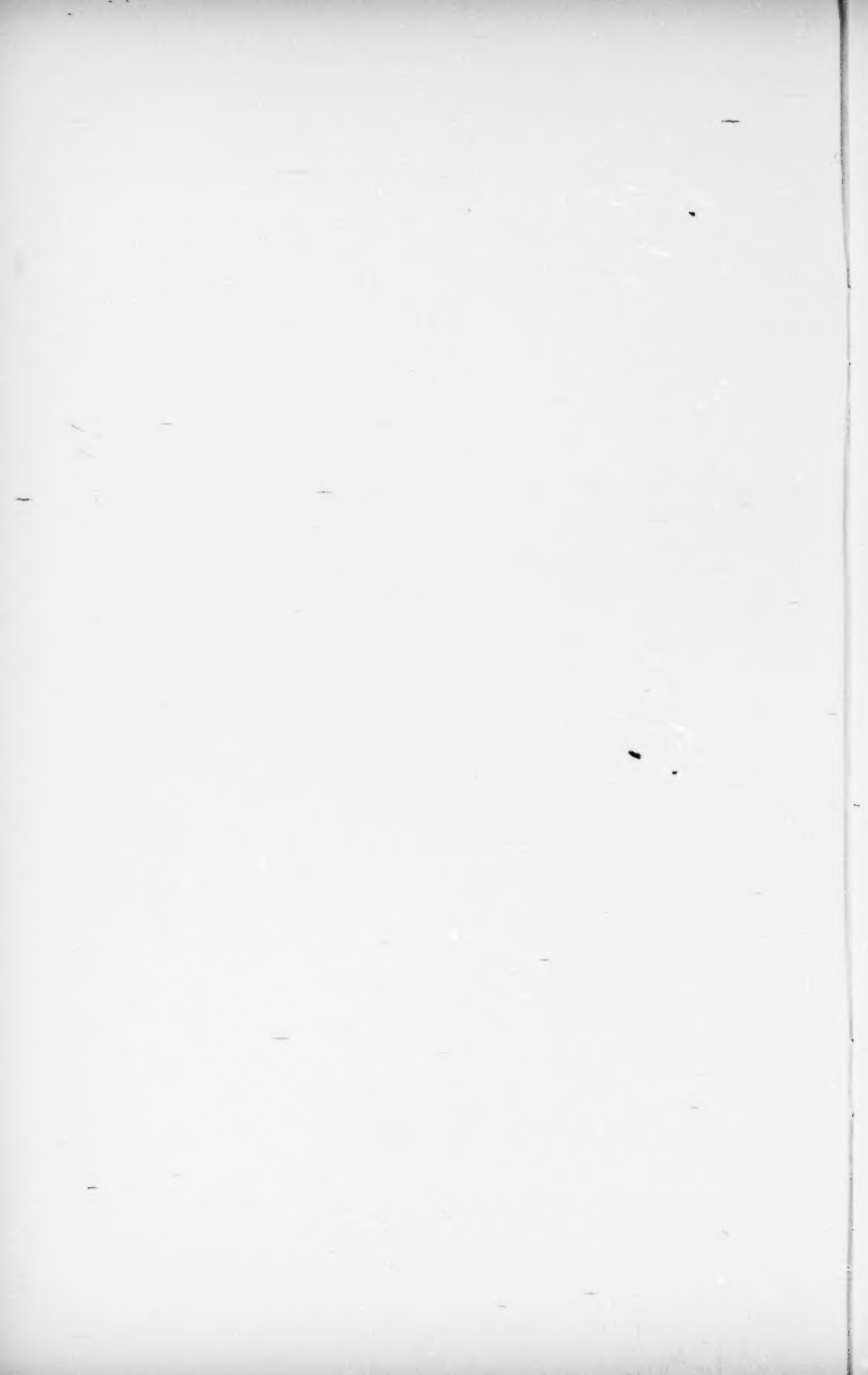
MOUNT HAWLEY INSURANCE COMPANY and
ST. KATHERINE INSURANCE COMPANY PLC,
Respondents

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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August 24, 1989

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QUESTIONS PRESENTED

Was the Court of Appeals wrong in finding that the record on appeal was void of a Motion for Directed Verdict on the Issue of Damages and therefore in error in affirming the trial court's denial of the petitioner's motion for j.n.o.v. on that basis?

If the Court of Appeals was correct in finding that the record on appeal was void of a Motion for Directed Verdict on the Issue of Damages was it error for the Court to raise the issue on its own for the first time on appeal?

LIST OF PARTIES

Petitioner is Dorman O. Young. He is an individual residing in Garland County, Arkansas. He did business as a sole proprietorship known as Tiffany's.

Respondents are corporations namely, Mount Hawley Insurance Company, a Delaware corporation and St. Katherine Insurance Company, PLC, a corporation of London, England.

Joe Noga was an individual. He was sued by the Respondents in a third party action. The United States Court of Appeals, Eighth Circuit, dismissed him as a party for lack of service sua sponte, in a preliminary opinion, see *Young v. Mt. Hawley Ins. Co.*, 64 F.2d 81 (Eighth Circuit 1988). Joe Noga is not named in the case's caption.

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No. _____

DORMAN O. YOUNG, d/b/a TIFFANY'S,
v. *Petitioner*

MOUNT HAWLEY INSURANCE COMPANY and
ST. KATHERINE INSURANCE COMPANY PLC,
Respondents

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

TO: The Honorable, the Chief Justice and Associate
Justices of the Supreme Court of the United States:

Dorman Young, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on April 25, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is unreported and is printed in the Appendix, *infra* page 1a. The judgment of the United States Court of Appeals for the Eighth Circuit is printed in the Appendix hereto, *infra* page 4a. The Journal Entry of the Judgment of the United States District Court for the Western District of Arkansas, Hot Springs Division is printed in the Appendix hereto, *infra* page 7a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit was entered April 25, 1989. A timely petition for rehearing was denied on May 30, 1989. A timely petition for rehearing was denied on May 30, 1989 (Appendix, *infra*, page 6a). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Arkansas Code Annotated 23-88-101

“(a) A fire insurance policy, in case of a total loss by fire of the property insured, shall be held and considered to be a liquidated demand and against the Company taking the risk, for the full amount stated in the policy, of the full amount upon which the company charges, collects or receives a premium.

(b) However, the provisions of this section shall not apply to personal property.”

Rules of the United States Court of Appeals for the Eighth Circuit Rule 7(2)

“All parties and counsel shall make every effort to prepare a concise record on appeal. The record should not include trial memoranda or briefs of law, or interlocutory motions or rulings, unless they bear directly on the issue(s) on appeal and then only to the extent necessary. Discovery material other than relevant deposition testimony that has not been incorporated in the transcript also should not be included in the designated record. Evidence produced by discovery may be referred to in the briefs with appropriate reference to any document in the original record. This Court will examine any original document if necessary to resolve any factual dispute relating to discovery material. This court may deny costs to a party who has caused the insertion of unnecessary material into the record of appeal. Moreover, any counsel who so multiplies the proceedings in any case as to increase costs unreasonably and

vexatiously may be required by the court to satisfy personally those excess costs, pursuant to 28 U.S.C. Section 1927, and may be subject to disciplinary sanctions.

FRCP 50(b)

“Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.”

STATEMENT OF THE CASE

This is a civil action filed in federal court, Federal Jurisdiction is based on 28 U.S.C. Section 1332, diversity of citizenship and an amount controversy in excess of \$10,000.00 (the 1986 required amount). Petitioner, Dorman Young, purchased an insurance policy from the respondents. Subsequently, a fire totally destroyed the insured property. After paying the mortgagee, the respondents refused to pay the petitioner on the defense of arson and misrepresentation.

After a jury trial, the jury found that the petitioner did not cause the fire nor did he misrepresent anything to the respondents. The jury awarded the petitioner \$102,000.00.

Petitioner timely moved for judgment notwithstanding the verdict pursuant to FRCP 50(b). The basis of the motion was that the damages issues were issues of law instead of fact due to Ark. Code Ann. 23-88-101. That statute requires insurance companies to pay the value of their policies on total losses to real property. Additionally, the facts presented at trial are undisputed as to the personal property coverage of the policy. The trial judge denied the motion.

Petitioner timely filed his appeal of the denial of the motion for judgment notwithstanding the verdict to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the trial court's denial of the Motion for Judgment Notwithstanding the Verdict. The Court of Appeals opinion stated that the record did not reflect a motion for directed verdict on the issue of damages by the petitioner, and therefore was not in compliance with FRCP 50(b). The Court of Appeals made this finding independently. The issue was neither argued or identified as an issue by either party at any stage of the proceedings. The joint appendix included the trial clerk's minutes indicating a directed verdict motion. Neither the trial judge nor the respondent ever asserted that the directed verdict motion was not properly made. Petitioner filed a Motion for Reconsideration which included the page of the joint appendix and a transcript of the oral directed verdict motion on the issue of damages. The Motion for Reconsideration was denied without comment.

REASONS FOR GRANTING THE WRIT

This writ should be granted as the United States Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of super-

vision. It is an absolute undisputed fact between the parties that the petitioner properly moved for a directed verdict on the issue of damages at trial.

In the response to the petitioner's Motion for Judgment Notwithstanding the Verdict, no challenge was made as to a proper directed verdict motion on the issue of damages. The trial court did not find that a directed verdict motion was not properly made.

In the joint appendix to the Court of Appeals, only the clerk's minutes reflecting the direct verdict motions were sent to evidence of the motions. The motions were not transcribed and sent as part of the record as they were not at issue and petitioner was seeking to comply with the Eighth Circuit Rule 7 to be concise. The first time the issue of a proper directed verdict motion was raised, it was raised by the Court of Appeals itself in its final opinion.

After receiving the judgment and opinion, petitioner filed a Motion for Reconsideration. He attached a copy of the joint appendix page reflecting the court clerk's minutes indicating the directed verdict motions and also included the transcribed directed verdict motions on the issue of damages. Petitioner confronted the Court of Appeals with their mistake in the Motion for Reconsideration. The Court of Appeals refused to correct this obvious error.

To allow this decision to stand is a miscarriage of justice. The Court of Appeals decision is based on an erroneous fact. That being that the record fails to reflect a proper directed verdict motion. The petitioner relied on the rules and had no reason to believe that the making of directed verdict motions on damages were at issue to require any further reflection in the appellate record than the clerk's minutes. The directed verdict motions on damages were made and there was no reason to clutter the record on appeal with this non issue. The present deci-

sion makes the damages question one of fact, and not law. The damages question is one of law, due to Ark. Code Ann. 23-88-101 and the undisputed facts at trial.

Additionally, the federal court is sitting as an Arkansas State Court. Its decision is the only exception to Ark. Code Ann. 23-88-101. This valued policy statute is steeped in public policy considerations in favor of the petitioner and other insurance policy holders.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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August 24, 1989

* Counsel of Record

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2469

DORMAN YOUNG d/b/a TIFFANY'S,
Appellant,
JOSEPH C. NOGA,

v.

MT. HAWLEY INSURANCE COMPANY;
ST. KATHERINE INSURANCE COMPANY PLC,
Appellees.

Appeal from the United States District Court
for the Western District of Arkansas

Submitted: February 14, 1989

Filed: April 25, 1989

Before WOLLMAN, Circuit Judge, and BRIGHT and
HENLEY, Senior Circuit Judges.

PER CURIAM.

- Dorman Young obtained a jury verdict of \$102,000 in this diversity action for recovery of fire insurance proceeds. After the district court entered judgment on the jury verdict, Young sought by a motion for judgment n.o.v. to increase the award from \$102,000 to \$186,203.24, the latter figure allegedly representing the undisclosed amount of the loss covered by the fire insurance policy in issue. The district court denied the motion, and this appeal followed. We affirm.

The policy in question insured a restaurant owned by Young that was totally destroyed by fire in 1986. The policy covered the building for \$225,000 and its contents for \$75,000. On appeal, Young asserts that the Arkansas valued policy statute, Ark. Code Ann. § 23-88-101 (1987), required the insurer to pay the full face value of policy coverage for real property loss, less the \$113,796.76 the insurer had previously paid to the mortgagee on the building. Young also argues that he presented undisputed evidence of personal property loss exceeding the \$75,000 policy limit. In total, Young claims that Arkansas law and the undisputed evidence entitle him to recover \$186,203.24, an amount greater than the jury award.

Contrary to Young's assertion, however, the record on appeal does not indicate that he moved for a directed verdict on the issue of damages. A party may not move for a judgment n.o.v. without first having moved for a directed verdict at the close of all the evidence. *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 294 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); Fed. R. Civ. P. 50(b). Therefore, we must construe Young's post-trial motion as one for a new trial for inadequacy of damages or for a new trial unless the insurance companies consented to an additur. A request for such relief lies within the sound discretion of the trial court. In this case, the district court did not abuse its discretion by denying relief.

One Joseph C. Noga, a named insured under the policy, was not a party to the lawsuit. Although Noga had been named in the suit, he had not been served as a party.¹ In awarding damages in the manner in which the case was submitted, the jury may well have limited the award to the actual loss sustained only by Young and disregarded Noga's interest in the building and its contents inasmuch as Noga never appeared at trial and the sole interrogatory on damages did not mention him. Significantly, Young did not object to the form of the instructions and interrogatories submitted to the jury.

We conclude that the district court did not err in rejecting Young's post-trial motion, and we affirm.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit.

¹ In a previously filed opinion, *Young v. Mt. Hawley Ins. Co.*, 864 F.2d 81, 82-83 (8th Cir. 1988), this court ruled that the district court had entered a final appealable order notwithstanding Noga's absence as a served party to the lawsuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2469

DORMAN YOUNG d/b/a TIFFANY'S,
Appellant,
JOSEPH C. NOGA,

vs.

MT. HAWLEY INSURANCE COMPANY;
ST. KATHERINE INSURANCE COMPANY PLC,
Appellees.

Appeal from the United States District Court
for the Western District of Arkansas

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties without oral argument.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

April 25, 1989

Appellees will recover from appellant the sum of \$55.17 for taxable costs on appeal.

5a

A true copy.

ATTEST:

/s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals
Eighth Circuit

Mandate Issued: 6/9/89

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2469WA

DORMAN YOUNG, ETC.,
Appellant,
vs.

MT. HAWLEY INSURANCE COMPANY, *et al,*
Appellees.

Appeal from the United States District Court
for the Western District of Arkansas

Appellant's petition for rehearing has been considered
by the Court and is denied.

May 30, 1989

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals
Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

No. 86-6105

DORMAN YOUNG d/b/a TIFFANY's and JOE NOGA,
Plaintiffs

vs.

MT. HAWLEY INSURANCE COMPANY and
ST. KATHERINE INSURANCE COMPANY PLC,
Defendants

ORDER

In this action separate plaintiff, Dorman Young, has filed a motion for judgment notwithstanding the verdict as returned by the jury in favor of the plaintiff in the sum of \$102,000.00.

After a three-day jury trial and the Court's instructions to the jury as to the applicable law, the jury deliberated for seven hours and returned a verdict in favor of the plaintiff based on the record submitted during the trial of the case.

The plaintiff seeks to set aside the judgment entered in accordance with the plaintiff's motion for a directed verdict. The thrust of the motion is to have the judgment set aside notwithstanding the jury verdict and for the court to enter judgment in behalf of the plaintiff, Dorman Young, in the sum of \$186,203.24.

The defendants have filed a response to the motion of the plaintiff and insists that there was substantial evidence presented during the course of the trial as to the

value of the property involved which was destroyed by fire. The defendants further contend that to set aside or modify the verdict of the jury would be to invade the province of the jury with respect to their consideration of the evidence as to damages and to interpose the Court's views on the jury's findings regarding the relationship between the named insureds.

The plaintiff contends that in addition to the Arkansas law requiring a modification of the jury verdict, that the Court's instructions to the jury were inappropriate and thus requiring the action as requested notwithstanding the jury verdict. At the time the case was submitted to the jury no objections were made on behalf of plaintiff, Dorman Young, as to the Court's instructions or forms of verdicts submitted to the jury for their convenience.

The case was well tried by the presentation of substantial testimony on behalf of both parties. The court attempted to instruct the jury as to the applicable law by which the jury would be guided in its deliberations.

The Court observed the proceedings very carefully and concludes that the jury was properly instructed and that there was substantial evidence to justify the verdict of the jury and that the motion to set aside the jury verdict and render a modified judgment in behalf of the plaintiff, Dorman Young, should be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the motion filed in behalf of the separate plaintiff, Dorman Young d/b/a Tiffany's, to set aside the verdict of the jury and enter judgment for separate plaintiff in the sum of \$186,203.24, as stated above herein, be and the same is hereby denied.

DATED this 13th day of September, 1988.

/s/ Oren Harris
OREN HARRIS
United States Senior District Judge

